Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-104

SAVE OUR WETLANDS, INC. (SOWL),
Petitioner,

versus

BENJAMIN R. CIVILETTI, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, LEISURE, INC., IN OPPOSITION

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OPINIONS BELOW

The Court of Appeals' order affirming the judgment of the District Court is reported at 594 F.2d 862 (1979) (Pet. App. 102). The District Court's order dismissing plaintiff's complaint is unreported (Pet. App. 99).[1]

1 The plaintiff in this proceeding is Save Our Wetlands, Inc. (SOWL). The originally named defendants were Edward H. Levi, Attorney General of the United States, Colonel Early Rush,

JURISDICTION

The judgment of the Court of Appeals was entered April 18, 1979 (Pet. App. 102). No petition for rehearing was filed. The petition for a Writ of Certiorari was filed July 17, 1979. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The question presented is whether this court should review the factual findings of the District Court and Court of Appeals, on which those courts concluded that the judgment in *Save Our Wetlands, Inc. v. United States Army Corps of Engineers*, 549 F.2d 1021 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977), operated as res judicata with respect to the matters raised in plaintiff's complaint in the matter now before this Court.

STATEMENT OF THE CASE

The present proceeding represents plaintiff's second attempt to enjoin maintenance of a governmental drainage district begun in 1927, and development of the Eden Isles subdivision begun in 1969 (Pet. App. 84-

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Commander of New Orleans District, United States Army Corps of Engineers, Mr. M. W. Hart, President, St. Tammany Parish Police Jury — all in their official capacities — and the St. Tammany Parish Police Jury. Leisure, Inc., the developer of the Eden Isles subdivision, was permitted to intervene as a defendant. Pursuant to Fed. R. App. P. 43(c) and Sup. Ct. R. 48(3), Benjamin R. Civiletti, Colonel Thomas A. Sands, and Earl D. Broom have been substituted for their predecessors in office, Messrs. Levi and Bell, Early Rush, and M. W. Hart, respectively.

85). Plaintiff's first suit was filed in October 1974 (Pet. App. 81). Following extended litigation, including a nine-day trial held before a Special Master (Pet. App. 82 n.1), the District Court, in February 1975, held that plaintiff's complaint was barred by laches (Pet. App. 83). The Fifth Circuit affirmed, 549 F.2d 1021 (1977) (Pet. App. 78). This Court denied plaintiff's petition for certiorari. 434 U.S. 836 (1977).

After the District Court dismissed petitioner's first suit, petitioner brought the instant proceeding, making substantially the same allegations as those contained in the first suit. The District Court held that petitioner's second suit was barred by res judicata. The district court stated: "[T]he sole issue with which the court is concerned is whether the maintenance of the levees and the alleged resultant drainage complained of in this suit was part of the subject matter litigated in the earlier suit. There is no question [but] that it was." (Pet. App. 100). The court then held: "[T]he parties, subject matter and cause of action are identical to issues litigated in the earlier suit and this action is barred by res judicata." (Pet. App. 101). The Court of Appeals affirmed, 594 F.2d 862 (5th Cir. 1979) (Pet. App. 102).

REASONS WRIT SHOULD BE DENIED

Petitioner has already presented the same arguments to a Special Master, the District Court, the Court of Appeals, and this Court, in the first suit; and

the same contentions have been presented again in this, the second suit, to the District Court and Court of Appeals. No court has upheld petitioner's unfounded assertions. The issue involved in this proceeding does not warrant review by this Court. The well-settled federal doctrine of res judicata was correctly applied by the courts below.

Res judicata bars subsequent litigation between parties concerning any cause of action that has been subject to a final judgment on the merits rendered by a court of competent jurisdiction. *Montana v. United States*, 99 S.Ct. 970, 973 (1979); *Parklane Hosiery Co. v. Shore*, 99 S.Ct. 645, 649 n.5 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

All of the elements of res judicata are present in this suit. Petitioner admits that the same parties involved in this present suit were parties to the first cause of action suit (Pet. 11).[2] Petitioner does not identify any evidence in the record that would call into question the District Court's and Court of Appeals' findings in this proceeding that the cause of action involved in this suit was the subject matter litigated in the earlier suit.

Petitioner, however, attempts to avoid the applica-

2 SOWL is the plaintiff in both actions. The defendants are also the same: (1) the District Commander of the New Orleans District Corps of Engineers, (2) the St. Tammany Parish Police Jury, (3) the President of the St. Tammany Police Jury, and (4) Leisure, Inc. Although the Attorney General of the United States is formally named as a defendant in only the second suit, the first suit also sought an order against the Attorney General.

tion of res judicata by contending that the decision holding that the first suit was barred by laches was not a judgment on the merits. However, a judgment on the merits, within the context of res judicata, means that the action was determined upon a legal right or substantive ground, as opposed to a disposition upon technical grounds of pleading or practice. *See Providential Development Co. v. United States Steel Co.*, 236 F.2d 277 (10th Cir. 1956); *Fairmont Aluminum Co. v. Commissioner*, 222 F.2d 622 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955). The decision in SOWL's first suit was rendered upon the substantive basis that the matters attempted to be litigated therein were barred by laches. Relitigation of the same issues is barred by res judicata.

The judgment in this proceeding was essentially a factual determination. In holding that this present suit was barred by res judicata, the District Court determined:

> "The entire complaint in this suit consists substantially of portions of paragraphs 49 through 68 of the complaint in the first suit. The prayer in the complaint seeks precisely the same relief as was sought in paragraphs 6 through 9 of the prayer in C.A. 74-2919" (Pet. App. 100-01).

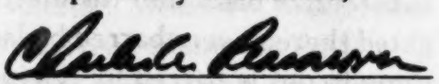
The lower courts compared the lengthy record in the first suit with the petition and parties before it in this, the second suit, and determined that the cause of action had previously been litigated between those same par-

ties and was therefore barred by res judicata.[3] As this case merely involves a factual determination made by the two courts below, this proceeding does not present an issue warranting review by this Court.

CONCLUSION

The judgments below were correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,



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3 In determining the applicability of res judicata, the court is not restricted to an examination of the opinions filed in the first proceeding, but may also examine the pleadings and record of the first suit. *See James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 459 n.7 (CA 5), *cert. denied*, 404 U.S. 940 (1971).

CERTIFICATE OF SERVICE

I, Charles K. Reasonover, attorney of record for respondent, Leisure, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of August, 1979, I served copies of the foregoing Opposition to Petition for Certiorari upon the Solicitor General of the United States and all other counsel of record in this proceeding by depositing same in the United States Mail, First Class, postage prepaid, addressed to them at their respective post office addresses.

Charles K. Reasonover